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No. 586

In the Supreme Court of the United States

OCTOBER TERM 1961

ST. HELENA PARISH SCHOOL BOARD, ET AL,
APPELLANTS
v.
LAWRENCE HALL, ET AL, APPELLEES

Appeal from the United States District Court for the Eastern District of Louisiana, Baton Rouge Division

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANTS.

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Appeal from the United States District Court for the Eastern District of Louisiana, Baton Rouge Division

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANTS.

JURISDICTIONAL STATEMENT

Appellants, St. Helena Parish School Board, J. L. Meadows, Superintendent of the St. Helena Parish School Board, State of Louisiana, Jack P. F. Gremillion, Attorney General of Louisiana, Murphy J. Roden, Director of Public Safety of Louisiana, Duncan S. Kemp, District Attorney of St. Helena Parish, Louisiana, and R. D. Bridges, Sheriff of St. Helena Parish, State of Louisiana, appeal from the judgment of the United States District Court for the Eastern District of Louisiana, Baton Rouge Division, sitting as a three-judge Court, entered on the 30th day of August, 1961, declaring unconstitutional Act 2 of the Second Extraordinary Session of the Lou-

isiana Legislature for 1961, and further enjoining appellants, and their successors, agents, representatives, attorneys, and all other persons who are acting or may act in concert with them, from enforcing or seeking to enforce by any means, the provisions of said statute. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Louisiana, Baton Rouge Division, is not yet reported, however the judgment of the Court and reasons therefor are attached hereto as Appendix "A".

JURISDICTION

This proceeding was brought under:

28 USC 1331, 28 USC 1343, 28 USC 2281, 28 USC 2284, 28 USC 2201 and 28 USC 2202.

The judgment and reasons therefor were entered on August 30, 1961, and Notice of Appeal was filed on September 11, 1961.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 USC 1253.

STATUTES INVOLVED

The statute involved is Act 2 of the Second Extraordinary Session of the Louisiana Legislature of

1961. The aforesaid Act is set forth in full in Appendix "B" hereof.

QUESTIONS PRESENTED

I.

Does the Court have jurisdiction over the subject matter?

II.

Is this a suit against the State and thus one prohibited by the Eleventh Amendment of the United States Constitution?

III.

Is not the United States participating herein without authority in law and equity?

IV.

Is not Act 2 of the Second Extraordinary Session of the Louisiana Legislature for 1961 constitutional and valid?

V.

Has not the United States failed to state a claim upon which relief can be granted?

VI.

Have the complainants herein not failed to join indispensable parties?

VII.

Is not the relief sought by the complainants herein premature?

VIII.

Does not Act 2 of the Second Extraordinary Session of the Louisiana Legislature for 1961 meet all of the requirements of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States?

STATEMENT OF THE CASE

Lawrence Hall and numerous other complainants filed a complaint on September 4, 1952 against the St. Helena Parish School Board and J. L. Meadows, Superintendent of the St. Helena Parish School Board. The cause originally instituted has been litigated before the United States District Court for the Eastern District of Louisiana, the United States Court of Appeals for the Fifth Circuit and writs were refused by this Court on October 9, 1961.

On March 17, 1961 the State of Louisiana was made a defendant. See Appendix C.

A supplemental complaint under the same number, title and style was filed by original plaintiffs on March 30, 1961, which supplemental complaint attacked the constitutionality of Act 2 of the Second Extraordinary Session of the Louisiana Legislature for 1961, and a three-judge Court was convened, pursuant to the United States Code to adjudge the validity of the said statute and entertain Motion for Preliminary Injunction enjoining appellants from implementing or giving any effect to the provisions of the said Act.

All appellants, with the exception of the St. Helena Parish School Board and J. L. Meadows, Superintendent of the St. Helena Parish School Board, State of Louisiana, who were original defendants, were joined as parties defendant by ex parte order of Court.

Jurisdiction of the supplemental complaint was invoked pursuant to 28 USC 2281 and 2284.

Hearing was held on the application for temporary injunction on April 14, 1961, after which the Court rendered the following per curiam:

> "The motions are overruled, in part because counsel for the plaintiffs has made it clear that the plaintiffs do not seek to enjoin the holding of the election fixed for April 22, 1961, in the Parish of St. Helena. The election has bearing in this case only as the initial step, under Act No. 2 of the Second Extraordinary Session of 1961, leading to the closing of public schools in St. Helena.
>
> If Act 2 is unconstitutional, the defendants properly before the Court may be enjoined from carrying out the provisions of the law.
>
> We have an open mind on the constitutionality of the statute. We point out, however, that national policy and state policy require us to scrutinize carefully any statute leading to the closing of public schools. When there is now such a manifest correlation between education and national survival, it is a sad and ill-timed hour to shut the doors to public schools. And, now, when one of the principal functions of the state is to main-

tain an educational system, it seems strange indeed and anti-civilized to shift the major financial burden to private persons, many of whom cannot afford or can ill-afford to pay for private schooling even with the benefit of a grant-in-aid. We think that this case raises due process questions that have not been briefed.

Does Act 2 violate the due process clause of the Fourteenth Amendment by depriving children of the opportunity to obtain a public school education? We divide this question into two sub-questions. (1) Is it implicit in today's concept of due process that a child has a right to a public school education, even though there is no provision in the state constitution requiring the state to maintain a public school system? (2) In the fact situation this case presents, considering especially that the state now maintains and has for many years maintained a public school system, does Act 2 violate due process if its effect is to deprive the children in St. Helena of a public school education?

We raise a futher question. Is a statute constitutional that, in effect, offers children (1) education on an unconstitutional condition, that is, attendance at a segregated school, or (2) no education at all?

The Court is cognizant of Act 258 of 1958 which provides for a grant-in-aid program. But is grant-in-aid an adequate constitutional substitute for public school education, particularly where such grant-in-aid will, in all probability, result in segregated private schools? The Court suggests that

consideration be given to this question in the briefs to be filed.

The Court invites counsel for all parties to file briefs by Friday, May 5, 1961. The Court also invites the United States to file a brief as amicus curiae presenting the views of the United States.

Because of the time required for the filing of the briefs and the determination of the case, it is suggested that, irrespective of the result of the election, the Board agree not to proceed under Act 2 pending our decision in this case."

On April 24, 1961, the Court issued the following orders:

"This case came on for hearing on plaintiffs' motion for temporary injunction restraining enforcement of Act 2 of the Second Extraordinary Session of 1961 of the Louisiana Legislature. The Court, finding that the motion raises serious constitutional questions, invited counsel for all parties to brief the questions presented. The United States was also invited to file a brief *amicus*. It appearing that questions presented by the motion may be of serious concern to the States of the United States;

IT IS ORDERED that the Attorneys General of the several states of the United States be, and they are hereby, invited by the court to file an *amicus* brief herein by June 5, 1961, covering the following questions:

1. Would the abandonment by a state of its public school system deprive children of rights guaranteed by the Due Process or Equal Protection Clauses of the Fourteenth Amendment?

2. Would the answer be the same if the abandonment were on a local option basis after a vote of the electorate authorizing county school authorities to close the public schools?

IT IS FURTHER ORDERED that the Clerk of this Court mail certified copies of this order to the Attorney General of each State of the Union."

On May 1, 1961, the Court again issued orders, as follows:

"This cause came on for hearing on plaintiffs' motion for temporary injunction restraining enforcement of Act 2 of the Second Extraordinary Session of 1961 of the Louisiana Legislature.

It appearing that additional evidence may be required for adequate consideration of the serious constitutional questions presented by the motion,

IT IS ORDERED that the parties to this action and the United States supplement the record with additional documentary evidence, including affidavits and newspapers, covering the following subjects:

1. The legislative history of Act. 2.

2. The existing private school facilities in St. Helena Parish for white as well as Negro pupils.

3. The amount expended for public school facilities in St. Helena Parish, the source of these funds, the bonded indebtedness of the St. Helena Parish School Board for school facilities, and the security for that indebtedness.

4. Any pertinent facts bearing on the constitutional questions raised by the court.

IT IS FURTHER ORDERED that this additional evidence be filed in the record not later than May 22, 1961."

Pursuant to the orders of the Court numerous briefs amicus curiae were filed, as well as briefs on behalf of the parties litigant and on August 4, 1961, oral arguments were presented to the Court and thereafter, on August 30, 1961, the Court issued its decision holding Act 2 of the Second Extraordinary Session of the Louisiana Legislature for 1961 unconstitutional and issued a preliminary injunction prohibiting appellants herein from enforcing or seeking to enforce by any means the provisions of the said statute.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

On March 17, 1961, the Court by ex parte order on motion of the United States, under the guise of "amicus curiae" ordered the State of Louisiana added as a party defendant herein. Copy of this order appears as Appendix C hereto. The United States is without any authority whatsoever in law or equity to participate piecemeal or otherwise in this litigation as a party litigant.

Higginbotham v. City of Baton Rouge 306 U.S 535;
Butler v. Commonwealth of Pa. 10 How. 402;
Crenshaw v. United States 134 U.S. 99;
Phelps v. Board of Education 300 U.S. 319;
Dodge v. Board of Education 302 U.S. 74;
Snowden v. Hughes 321 U.S. 1;

Congressional Record of 1957 Pages 11377 and 11378;
Bill H.R. 6128, 85th Congress (original) Pages 9 and 10;
28 U.S.C. 501;
28 U.S.C. 507;
La. Const. of 1921, Article 12, Section 1; Amendment 11, United States Constitution;
Hans v. State of La. 134 U.S. 1;
Larson v. Domestic and Foreign Corp. 337 U.S. 682;

Further, as the State of Louisiana was made a party defendant in this suit which from its commencement was one prosecuted by citizens of one of the United States, jurisdiction failed. See: Louisiana Constitution of 1921, Article 19, Section 26, and the Eleventh Amendment to the Constitution of the United States.

Noah et al v. Board of Education, District of Columbia 106 Fed. Supp. 988;
Parker v. Board of Education of Sumter County 70 S.E. 2d 360 (Ga.);
Smith v. Hefner 68 S.E. 2d 783 (N. C.)
Stephan v. La. Board of Education 78 So. 2d 18;
Charlottesville v. Allen 240 Fed. 2d 59;
Aerated Products Co. of Philadelphia, Pa. v. Department of Health of N. J. et al, 159 Fed. 2d 851;
Ford Company v. Department of Treasury 323 U.S. 459;
Baldwin v. G.A.F. Seelig 294 U.S. 511;
U.S. Department of Agriculture, et al, v. Hunter, et al, 171 Fed. 2d 793;

U.S. Department of Agriculture v. Remund 330 U.S. 539;
New Haven Public Schools v. General Service Administration 214 Fed. 2d 592;
Herrin v. Farm Security Administration 153 Fed. 2d 76;
Thomason v. Works Progress Administration 138 Fed. 2d 342;
N. Dakota-Montana Wheat Growers' Assn. v. U.S. 66 Fed. 2d 573; certiorari denied; 291 U.S. 672;
Blackmar v. Guerre 342 U.S. 512;
Georgia Railroad and Banking Company v. Redwine 342 U.S. 299.

Perusal of the Court's temporary injunction (Appendix A) readily reflects that the individual members of defendant board were cast in equity and the record shows that the individual members of the board were not made parties defendant hereto although they were found to be indispensable parties by judgment of the Court.

The Court below erred in deciding the constitutional issues on facts not germane to the issues, as well as by misapplication of legal principles.

In its decision below the Court found that Act 2 violated the equal protection clause of the United States Constitution in two respects; improper classification and illegal evasion.

Before proceeding to discuss these issues, it is necessary to eliminate one trend of thought which pervades the lower Court's opinion. Throughout the

opinion the Court takes great pains to point out to what extent, private schools, if organized, would constitute state action.

> "This analysis of Act 2 and related legislation makes it clear that when the Legislature integrated Act 2 with its companion measures, especially the "private" school acts, as part of a single carefully constructed design, constitutionally the design was self-defeating. Of necessity, the scheme requires such extensive state control, financial aid, and active participation that in operating the program the state would still be providing public education. The state might not be doing business at the old stand; but the state would be participating as the senior, and not silent, partner in the same sort of business. The continuance of segregation at the state's public-private schools, therefore, is a violation of the equal protection clause." (Court's opinion, page 42).

> "This scheme of the Louisiana Legislature to deny school children constitutional rights is not new. It has been tried before, with similar results. In declaring such a scheme unconstitutional, the Eighth Circuit, in *Aaron v. Cooper*, 261 F. 2d 97, 106-107, relied heavily on this pronouncement by the Supreme Court: 'State support of segregated schools, through any arrangement, management, funds, or property cannot be squared with the Fourteenth Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws.' *Aaron v. Cooper*, supra, 19. The ruling here must be the same." (Court's opinion, page 43).

This would merit serious consideration if the question before the Court were, are those schools discriminating in admitting students because of race, color or creed, but absent that question the Court's discussion is rankest dicta and serves only to confuse the real constitutional issue which must be decided. May a Parish constitutionally abandon a public school system?

Let us first consider whether Act 2 affects the Parish of St. Helena and its residents in such a manner as to constitute an illegal or unconstitutional classification, or, for that matter, any type of classification whatsoever.

As a general proposition the laws enacted by a State Legislature must apply equally to all persons within the confines of the State. There are, however, two methods by which the laws enacted by the State Legislature may vary within the State. First, the Legislature may enact laws applicable to a certain class or classes within its boundaries. Legislative classification if not palpably arbitrary and if it may reasonably be conceived to rest on some real and substantial difference or distinction bearing a just and fair relation to the Legislation is no denial of equal protection of the laws. 16A C.J.S. Section 505 Page 314. This is the type of Legislation passed on by the Court in the case of *James v. Almond*, 170 Fed. Supp. 331.

In that case the Legislature of the State of Virginia had passed an act permitting the Governor of

the State of Virginia to assume control of schools under certain conditions. Pursuant to that statute, the Governor by executive order seized control of certain schools integrated by the City of Norfolk. He then proceeded to order the desegregated schools not to open even though other schools in the city and state were open. The Court stated:

> "Tested by these principles we arrive at the inescapable conclusion that the Commonwealth of Virginia, having accepted and assumed the responsibility of maintaining and operating public schools, cannot act through one of its officers to close one or more public schools in a state solely by reason of the assignment to, or enrollment or presence in, the public school of children of different races or colors, and at the same time, keep other public schools throughout the state open on a segregated basis."

According to the Court's opinion, the Virginia Legislation would result in some of the children in the state attending public schools while the other children in the state would not be afforded the same privilege, thus not affording equal treatment within the political unit establishing the policy. Since there was no reasonable basis for the different treatment it was an illegal classification which denied to certain citizens of the State the equal protection of the laws guaranteed under the Fourteenth Amendment.

The second method by which different laws and different rules may prevail in various localities of the State is the "home rule" or "local option" statutes.

This type of Legislation is a permissive grant by the State to its political subdivisions to establish rules and/or regulations under which they choose to operate. "Home rule" permits localities, political subdivisions, etc., to adopt certain laws and rules by which it chooses to be governed. When the right of local option is exercised by a political subdivision of the State, there is no necessity of applying the rule of legislative classification since the rule, law or regulation will apply equally to all persons within the geographical or political unit, and consequently cannot result in denial of equal protection. The validity of the so-called "home rule" or "local option" adoption of different rules within a political or geographical area was approved by the Supreme Court in the case of *Salzburg v. State of Maryland*, 346 U.S. 545, wherein the Court said:

> "There seems to be no doubt that Maryland could validly grant home rule to each of its 21 counties and to the City of Baltimore to determine this rule of evidence by local option."

Again in the case of *Greensboro v. Tonkins*, 276 Fed. 2d 890, the Court was faced with a problem where a municipality was going to cease to offer a certain service even though the same service was offered to their local citizens by other communities throughout the State. The Court held that the city could validly sell its swimming pool and cease operation thereof even though the sale was made pursuant to and authorized by a statute of the State of North Carolina.

> "North Carolina private laws 1923 Ch. 37, Section 79 has amended N. C. Sess. Laws 1957 Ch. 960, Section 4."

In effect, the Court permitted the City of Greensboro to withdraw a service offered to the citizens of the City of Greensboro pursuant to a State statute, provided that it affected all citizens of that City the same, without regard as to how it affected the rest of the citizens of the State.

In discussing and commenting upon this decision, a commentator of the Harvard Law Review, Volume 72, Page 1567, stated as follows:

> "It could be argued that since the municipality is merely a creation of the state, and since its power to sell is authorized by State statute, its action in closing the pool should be attributed to the state, thus presenting a situation similar to that of the James case, assuming that other municipal swimming pools in the state remained open. Nevertheless, it appears that a municipality should be required to act only in relation to persons within its jurisdiction, and that it fulfills its constitutional obligations when it treats all such persons equally. To require more would place a virtually impossible burden upon municipalities, and would tend to defeat the diversity which is one of the aims of local government. Thus, although discrimination by a municipality among its residents in the operation of recreational facilities is properly attributed to the state, it does not seem desirable to extend the 'state action' concept so as to transform a nondiscriminatory municipal act into state discrimination under the fourteenth amendment."

This distinction was again recognized by the Fifth Circuit Court of Appeal in the case of *Montgomery v. Gilmore*, 277 Fed. 2d 364. Here the Court again noted the difference and distinction between the application of a rule passed by a political subdivision to the persons located within that subdivision, and a general classification statute by the State affecting different classes in different ways. In footnote 4 of the case, the Court stated as follows:

> "In our opinion, the closing of all the public parks of the City does not violate the equal protection of the laws of the citizens of Montgomery, under the doctrines of *James v. Almond*, *D.C.E.D. Va.* 1959 170 Fed. Supp. 331; *James v. Duckworth*, *D.C.E.D. Va.* 1959, 170 Fed. Supp. 342, and *Harrison v. Day*, 1959, 200 Va. 439, 106 S.E. 2d 636."

The Federal Courts in this State have acknowledged and the United States Supreme Court has affirmed the proposition that the various school boards within the State of Louisiana may, subject to a permissive statute of the Legislature, adopt rules which would not be uniform throughout the State, but which would be completely uniform and equally administered within the unit of the parish itself.

Hughes v. Caddo Parish School Board, et al, 57 F. Supp. 508, affirmed 323 U.S. 685.

In that case, the Legislature gave to each parish school board in the State the power to abolish high school fraternities and sororities and further to dis-

cipline any student who remained a member thereof. This statute was attacked on many grounds, one of which was that it was a violation of the equal protection clause of the Fourteenth Amendment clause of the United States Constitution. The Court in commenting on the claim of denial of equal protection stated, on page 512:

> "In the instant case the student is a member of the fraternity chapter in Byrd High School where entrance and enrollment are sought. Because of the disciplinary measures which the State Legislature and the Caddo Parish School Board are seeking to establish in the schools under their respective police authority, this student may be legally compelled to comply with these measures."
>
> "The manner of application of the law becomes adsolutely uniform— there is not even the semblance of any discrimination as was alleged to exist in the Waugh case, and which was pressed before and considered by the Supreme Court of the United States."

The statute involved in that case is quite similar to the one herein, in that the Legislature gave the permissive right to the various local school boards to adopt a certain set of rules and procedures. It was conceded in the case that the school boards throughout the State might not adopt the same practice, however if they did though, it would apply to all students within that political unit. That case and the one at bar cannot be distinguished with regard to the application of the equal protection clause.

The Court in the decision below attempts to distinguish the principles set forth in the local option liquor law cases. *Rippey v. State of Texas* 193 U.S. 504 and *Lloyd v. Dollison* 194 U.S. 445.

The Court reasoned that the local option statutes were good in those matters only because the State had complete and absolute control over the distribution and sale of liquor. The converse is true. 16-A C.J.S. Constitutional Law, Section 6, 512 at page 358:

> "The constitutional guaranty of the equal protection of the laws is applicable to regulations with respect to intoxicating liquors and the sale thereof. However, the control of the sale, use, transportation, and consumption of intoxicating liquor, being peculiarly within the province of legislative powers, the regulation, or even the prohibition thereof, does not necessarily deny anyone equal protection of the laws."

The only difference between education and liquor trade, insofar as State control is concerned, is one of degree. The State may prohibit the sale or manufacture of liquor, while it may not prohibit education, but this does not in the least prohibit it from delegating to localities the power which it does retain.

The final determination of educational policies in governmental units or subdivisions of the State is not foreign to Louisiana or to other states in the union. This may be done on a county basis, or as in many states by school districts. Index Digest of State Constitutions, p. 390. It is generally recognized that a

state legislature may authorize residents of local school districts to vote upon bonding, finances and other matters of government connected with the operation of local schools. *Kee v. Parks*, 153 Tenn. 306, 283 S.W. 751; In Re School Code of 1919, 7 Boyce 406, 108 Atl. 39; *State v. Lamont*, 105 Kan. 134, 181 Pac. 617. A clear statement of the generally recognized rule as regards local operation of schools is found in 16 C.J.S., Constitutional Law, Sec. 142, at page 683, where it is said:

> "The legislature may provide laws as to the establishment, division, alteration, enlargement, or abolition of schools and school districts, and the control of schools to take effect when adopted by a vote of the people of the district."

In *People v. Cowen*, 283 Ill. 308, 119 N.E. 335 (1918) the Illinois Supreme Court stated with reference to the legislative power to delegate to a local body the power to abolish a high school:

> "The legislature has supreme power over public corporations, and may divide, alter, enlarge, or abolish them as in the legislative judgment the public welfare may require. This power may be exercised by the Legislature itself by direct legislation, or it may delegate the power to certain officers, courts, or the electors of a municipality.***"

The court concluded that the electors of a school district could properly vote to abolish a school.

The principle of local option is too well established to charge it with being contrary to the Federal Con-

stitution as such. *Downs v. Boonton*, 99 N.J. Law 40, 122 A. 721; *State v. Baxter*, 195 Wis. 437, 219 N.W. 858; *State v. Briggs*, 46 Utah 288, 146 Pac. 261; *Ohio v. Dollison* 194 U.S. 445.

It must be concluded that no constitutional objection can be raised to the closing of schools on a local option basis.

The other basis upon which the Court found Act 2 unconstitutional is:

> "Most immediately, it is a transparent artifice designed to deny the plaintiffs their declared constitutional right to attend de-segregated schools."

If this is the doctrine of the United States District Court for the Eastern District of Louisiana, it is without a doubt novel, startling and entirely unfounded in law. The Court in its holding here makes it mandatory that the parish furnish to the plaintiffs a public school and further that said public school must be desegregated. The basis for such a judicial pronouncement can be found neither in the law nor jurisprudence.

The Court herein apparently misconstrued the doctrine of the Brown case. The same was analyzed and its doctrine clearly set forth in the case of *Briggs v. Elliott*, 132 F. Supp. 776, 777, wherein the Court said:

> ". . . It is important that we point out exactly what the Supreme Court has decided and what

> it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any schools that it maintains. . . Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. . ."

This interpretation of the Brown case has been adopted by the Fifth Circuit Court of Appeals in *Avery v. Wichita Falls Independent School District* 241 Fed. 2d 330, certiorari denied 353 U.S. 938, as well as by other Federal Courts. *Thompson v. School Board of Arlington*, 144 F. Supp. 239 (D.C. Va. 1956), aff'd sub nom. *School Board of Charlottesville v. Allen*, 240 F 2d 59 (C.A. 4th 1956), cert. den. 77 S. Ct. 667; *Borders v. Rippey*, 247 F2d 268 (C.A. 5th 1960); *Calhoun v. Board of Education of Atlanta*, 188 F. Supp. 401 (D.C. Ga. 1959); *Henry v. Godsell et al.*, 165 F. Supp. 87 (D.C. Mich. 1958); *Kelley v. Board of Education of Nashville*, 270 F. 2d 209 (C.A. 6th 1959), cert. den. 361 U.S. 924; *Dove v. Parham*, 181 F. Supp. 504 (D.C. Ark. 1960); *Holland v. Board of Public Instruction*, 258 F2d 730 (C.A. 5th 1958); *Montgom-*

ery v. Gilmore, 277 F2d 364 (C.A. 5th 1960).

Additionally, the Court below has in effect proclaimed that the plaintiffs have an absolute, unconditional, constitutional right to attend a de-segregated school. This premise, that the plaintiffs have a right to attend a school at all, is again without support in law.

Appellants do not doubt that if public education were offered to some students in an area, it would have to be granted to all students on an equal basis, however the requisite of equality of a service furnished does not obligate the state to furnish the service.

In the case of *Everson v. Board of Education*, 330 U.S. 1, 21, the late Justice Jackson, stated:

> "The Constitution says nothing of education. It lays no obligation on the states to provide schools and does not undertake to regulate state systems of education if they see fit to maintain them."

In addition to extending the doctrine of the Brown case, as stated above, the Court below in its opinion developed three new axioms which can be used for constitutional interpretation. They are unconstitutionality by association, conjecture and privilege.

This Court for the past several years has on many occasions been confronted with the question of the validity of "guilt by association". The Court's opinion below has developed a companion doctrine which might well be labeled "unconstitutionality by association". The Court in its opinion found that other acts

declared unconstitutional must necessarily pass their unconstitutionality on to Act 2.

> "The Louisiana Legislature has confected one 'evasive scheme' after another in an effort to achieve this end. This Court has held these unconstitutional in one decision after another, affirmed by the Supreme Court. Yet they continued to be enacted into law. . ."
>
> "On its face, this section appears inoffensive. It is only after an analysis of the school closing measure, other sections of the act and related legislation that the purpose, mechanics, in effect of the clan emerged."

The Court furnishes absolutely no authority for the proposition that it possesses the power to invalidate acts of the sovereign state solely on the finding that those acts are part of a pattern or plan. No criterion of standards were eluded to which might define this new principle. Presumably, the Court believes that because Louisiana has sinned constitutionally before, every other act which its legislature subsequently enacts is likewise invested with the same infirmity to such an extent as to dispense with the necessity of individual adjudication. Negro plaintiffs have merely to shout the magic word "pattern", and invalidation follows as a matter of course.

We think the true rule is stated in *Dove v. Parham*, 176 F. Supp. 242 reversed in part in other grounds, 271 Fed. 2d 132:

> "Implicit the rules applied in those cases and controlling in the Arkansas pupil placement law

> being within constitutional boundaries is the principle, that a state plan for resistance to racial integration in its public schools, is without significance as to the constitutionality of such laws if legitimate and constitutional means are used in the operation of the plan and the attainment of its objective."

Throughout its opinion the Court pre-assumes to determine how Act 2 and other Acts of the State of Louisiana are to be inter-related, how they will be applied, how they will effect the petitioners as well as others in the parish, and their eventual effect upon the individual community and state. Conjecture, suspicion and clairvoyance are indeed strange avenues by which to arrive at the constitutional determination of the validity of a sovereign state statute. This Court, in a recent case, frowned upon such methods of arriving at a determination of the constitutionality of a statute when it said:

> "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power— 'the gravest and most delicate duty that this Court is called on to perform'. *Marbury v. Madison*, 1 Cranch 137, 177—180, 2 L. Ed. 60. This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to ad-

judge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Immigration*, 113 U.S. 33, 39, 5 S. Ct. 352, 355, 27 L. Ed. 899. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. *United States v. Wurzbach*, 280 U.S. 396, 50 S. Ct. 167, 74 L. Ed. 58; *Heald v. District of Columbia*, 259 U.S. 114, 123, 42 S. Ct. 434, 435, 66 L. Ed. 852; *Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 33 S. Ct. 40, 57 L. Ed 193; *Collins v. State of Texas*, 223 U.S. 288, 295— 296, 32 S. Ct. 286, 288, 56 L. Ed. 439; *People v. State of New York* ex rel. *Hatch v. Reardon*, 204 U.S. 152, 160-161, 27 S. Ct. 188, 190-191, 51 L. Ed. 415. Cf. *Voeller v. Neilston Wholesale Co.*, 311 U.S. 531, 537, 61 S. Ct. 376, 379, 85 L. Ed. 322; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 513, 57 S. Ct. 868, 874, 81 L. Ed. 1245; *Virginian R. Co. v. System Federation*, 300 U.S. 515, 558, 57 S. Ct. 592, 605, 81 L. Ed. 789; *Blackmer v. United States*, 284 U.S. 421, 442, 52 S. Ct. 252, 257, 76 L. Ed. 375; *Roberts & Schaefer Co. v. Emmerson*, 271 U.S. 50, 54-55, 46 S. Ct. 375, 376-377, 70 L.

Ed. 827; *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 576, 35 S. Ct. 167, 169, 59 L. Ed. 364; *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 21 S. Ct. 206, 45 L. Ed. 252; *Ashwander v. Tennessee Valley Authority* 297 U.S. 288, 347-348, 56 S. Ct. 466, 483-484, 80 L. Ed. 688 (concurring opinion). In *Barrows v. Jackson*, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586, this Court developed various reasons for this rule. Very significant is the incontrovertible proposition that it 'would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.' Id., 346 U.S. at page 256, 73 S. Ct. at page 1035. The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined. The Court further pointed to the fact that a limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were in fact concretely presented. We might add that application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." *U.S. v. Raines* 362 U.S. 17

Appellants, until the decision of the Court below, were of the opinion that all parts of the Constitution were of equal importance and that all privileges, rights and immunities granted to the citizens of the United States were equally protected. It was with conster-

nation we discovered the contrary, in the decision of the Court below:

> "Irrespective of the express terms of a statute, particularly in the area of *racial discrimination*, Courts must determine its purposes as well as its substance and effect." (emphasis supplied)

Absent the feeling of the Court, as expressed above, appellants feel that many of the questions raised and decided in this case would have never received serious consideration, had they arisen in different context. The fact that the United States Government was the paladin of the plaintiffs or that the states involved had expressed disagreement of the Supreme Court decisions of late, or that the principles are here challenged by those who currently are special favorite of the laws, does not change the law. As appropriately stated by Mr. Justice Bradley, almost eighty years ago in the Civil Rights cases 109 U.S. 3:

> "When a man has emerged from slavery, and by the aid of the beneficient legislation has shaken off the inseparable concommitants of that state, there must be some stage in the progress of his elevation *when he takes the rank of a mere citizen*, and ceases to be a special favorite of the laws, and when his rights as a citizen, or a man, must be protected in the ordinary modes by which other men's rights are protected." (emphasis added)

CONCLUSION

WHEREFORE it is respectfully submitted that this Court has jurisdiction of this Appeal and it is respectfully suggested this Court find this case an appropriate one for reversal and dismissal of the complaint, dissolving and recalling the temporary injunction.

Respectfully submitted,

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PROOF OF SERVICE

I, JACK P. F. GREMILLION, Attorney General for the State of Louisiana, and attorneys for appellants herein and a Member of the Bar of the Supreme Court of the United States, do hereby certify that copies of the foregoing Jurisdictional Statement for appellants were served upon the appellees through their counsel of record, herein below named, by placing the same in the United States mail, addressed to them at their offices with sufficient postage thereto annexed:

Mr. A. P. Tureaud, 1821 Orleans Avenue, New Orleans, Louisiana, Mr. Robert L. Carter, 20 West 40th Street, New York 18, New York, via air mail, and Mr. Jack Greenberg and Mr. Thurgood Marshall, 10 Columbus Circle, New York, New York, via air mail.

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APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

No. 1068 CIVIL ACTION

LAWRENCE HALL, ET AL, PLAINTIFFS

v.

ST. HELENA PARISH SCHOOL BOARD, ET AL, DEFENDANTS

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WISDOM, Circuit Judge, and CHRISTENBERRY and WRIGHT, District Judges:

Undeterred by the failure of its prior efforts, the Louisiana Legislature continues to press its fight for racial segregation in the public schools of the state. Today we consider its current segregation legislation, the keystone of which, the local option law, is under attack in these proceedings.

On May 25, 1960, this court entered its order herein restraining and enjoining the St. Helena Parish School Board and its superintendent from continuing the practice of racial segregation in the public schools under their supervision "after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed." The Court of Appeals affirmed this judgment on Fedruary 9, 1961.[1]

On February 9, 1961, the very day of the affirmance of the order of this court,[2] the Governor of the State called the Second Extraordinary Session

[1] *St. Helena Parish School Board v. Hall*, 5 Cir., 287 F. 2d 376.

[2] Order of this court requiring desegregation of the Baton Rouge public schools and five state trade schools were also affirmed on Feb. 9, 1961. *East Baton Rouge Parish School Board v. Davis*, 5 Cir., 287 F. 2d 380; *Louisiana State Board of Education v. Allen*, 5 Cir., 287 F. 2d 32; *Louisiana State Board of Education v. Angel*, 5 Cir., 287 F. 2d 33.

of the Louisiana Legislature for 1961 into session to act "relative to the education of the school children of the State * * * for the preservation and protection" of state sovereignty. Within a few days of the call, he certified as emergency legislation what became Act 2[3] of that session, the local option law in suit, as well as related legislation designed to continue racial segregation in the public schools, in spite of the desegregation order of this court in this case in particular and desegregation orders in general. As is manifest from the legislative history of the statute and an analysis of its provisions as these are related to cognate legislation, the sub-surface purpose of Act 2 is to provide a means by which public schools under desegregation orders may be changed to "private" schools operated in the same way, in the same buildings, with the same furnishings, with the same money, and under the same supervision as the public schools. In addition, as part of the plan, the school board of the parish where the public schools have been "closed" is charged with responsibility for furnishing free lunches, transportation, and grants-in-aid to the children attending the "private" schools.

The statute in suit violates the equal protection clause on two counts. Most immediately, it is a transparent artifice designed to deny the plaintiffs their declared constitutional right to attend desegregated public schools. More generally, the Act is assailable because its application in one parish, while the state

[3]La. R.S. 17:350.

provides public schools elsewhere, would unfairly discriminate against the residents of that parish, irrespective of race.

The language of the Supreme Court in *Cooper v. Aaron*, 358 U.S. 1, 17, cannot be disregarded: "The constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' *Smith v. Texas*, 311 U.S. 128, 132." These words tell the Louisiana Legislature, as clearly as language can, that school children may not be denied equal protection of the laws, may not be discriminated against in school admissions, on grounds of race or color. The Louisiana Legislature has confected one "evasive scheme" after another in an effort to achieve this end. This court has held these unconstitutional in one decision after another affirmed by the Supreme Court.[1] Yet they continue to be enacted into law.

As with the other segregation statutes, in drafting Act 2 the Legislature was at pains to use language disguising its real purpose. All reference to

[1]See *Bush v. Orleans Parish School Board*, E.D. La., 138 F. Supp. 337, affirmed, 242 F. 2d 156; id., 163 F. Supp. 701, affirmed, 268 F. 2d 78; id., 187 F. Supp. 42, affirmed, 365 U.S. 569; id., 188 F. Supp. 916, affirmed, 365 U.S. 569; id., 190 F. Supp. 861, affirmed, 366 U.S. 212; id., 191 F. Supp. 871, affirmed, 366 U.S. 212; id., 191 F. Supp. 871, affirmed, ... U.S. .... (6-19-61); id., 194 F. Supp. 182.

race is eliminated, so that, to the uninitiated, the statute appears completely innocuous. For example, the first section of Act 2 reads:

> "In each parish of the state, and in each municipality having a municipally operated school system, the school board shall have authority to suspend or close, by proper resolution, the operation of the public school system in the elementary and secondary grades in said parish or municipality, but no such resolution shall be adopted by any such board until the question of suspending or closing the operation of such public school system in such grades shall have been submitted to the qualified electors of the parish or municipality, as the case may be, at an election conducted in accordance with the general election laws of the state, and the majority of those voting in said election shall have voted in favor of suspending or closing the operation of such public school system."

On its face, this section appears inoffensive. It is only after an analysis of this school closing measure with other sections of the Act and related legislation that the purpose, mechanics, and effect of the plan emerge.

(Irrespective of the express terms of a statute, particularly in the area of racial discrimination, courts must determine its purpose as well as its substance and effect.) "A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a

[1]Act 2, of course, must be read with other legislation in pari materia. See 2 Sutherland, Statutory Construction (3rd Ed. 1943), §§5201-5202, pp. 529-539. See also cases cited in Note 4.

purpose of the act." *Miller v. Milwaukee*, 272 U.S. 713, 715. Moreover, "acts generally lawful may become unlawful when done to accomplish an unlawful end." *Western Union Tel. Co. v. Foster*, 247, U.S. 105, 114.[5] The defendants argue that we should not probe for the purpose of this legislation, that we should ignore the events which led up to and accompanied its passage, and determine its validity based on its language. But "* * * we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men."[6]

The sponsors of this legislation, in their public statements, if not in the Act itself, have spelled out its real purpose.[7] Administration leaders repeatedly said that the local option bill should not be construed as indicating the state would tolerate even token integration. The law would be used in parishes either having or threatened with desegregation: Orleans, East Baton Rouge and St. Helena. Times-Picayune, February 20, 1961. The program for the

[5]See also *Grosjean v. American Press Co.*, 297 U.S. 233; *Gomillion v. Lightfoot*, 364 U.S. 339, 347-348; *Rice v. Elmore*, 4 Cir., 165 F. 2d 387, 391; *Baskin v. Brown*, 4 Cir., 174 F. 2d 391, 393.

[6]Mr. Justice Field, sitting as Circuit Judge, in *Ho Ah Kow v. Nunan*, 9 Cir., 5 Sawyer 552, 560.

[7]In Louisiana, as most states, the legislative debates, committee proceedings, and committee reports are not recorded officially. Going to the next best records, newspapers, we find in the record of this case a mass of contemporary newspaper articles, filed by the plaintiffs and by amicus curiae, bearing on the legislative history of Act 2 and its related measures. Affidavits from the authors of the articles attest their accuracy. In all instances they are part of the official records. Their reliability is evidenced by their substantial agreement.

legislative session which adopted Act 2 was worked out by the so called "Liaison Committee," a committee charged with co-ordinating the administration's segregation strategy. Times-Picayune, February 11, 1961. Representative Risley Triche, administration floor leader and sponsor of Act 2, told the House of Representatives, "The bill does not authorize any school system to operate integrated schools. We haven't changed our position one iota. This bill allows the voters to change to a private segregated school system. That's all that it's intended to do. I don't think we want to fall into the trap of authorizing integrated schools by the votes of the people. This bill doesn't allow that and we're not falling into that trap." Times-Picayune, February 18, 1961. The president pro tem of the Senate explained the bill as follows: "As I see it, Louisiana is entering into a new phase in its battle to maintain its segregated school system. The keystone to this new phase is the local option plan we have under consideration." Times-Picayune, February 20, 1961. And

"Representative Salvador Anzelmo, one of the two legislators to vote against Act 2 declared that in actuality the local option was a misnomer; it did not give the people an option because if they voted to keep the schools open, those schools which are integrated would be forced to close because state funds would be cut off. Representative Anzelmo said: "They are not going to get any money if they keep the schools open. We give them no choice. I say this is a bad bill because the intent is to positively kill public education in Louisiana. We will kill the youth of Louisiana, we kill the aspirations and hope of Louisiana.

You'll be haunted by that vote the rest of your life, because the poor people of this state will not be able to get an education. In effect, we are giving the people no option whatever. The only thing we are doing is providing the apparatus to close the schools of this state." *Shreveport Times*, Feb. 18, 1961.

segregation leader Representative Wellborn Jack was even more explicit: "It gives the people an opportunity to help fight to keep the schools segregated. We are the ones who have been speaking for segregation. This is going to give the people in all 64 parishes the right to speak by going to the polls. This is just to recruit more people to keep our schools segregated, and we're going to do it in spite of the federal government, the brainwashers and the Communists." Shreveport Times, February 18, 1961. In short, the legislative leaders announced without equivocation that the purpose of the packaged plan was to keep the state in the business of providing public education on a segregated basis.

The legislative scheme here, once revealed, is disarmingly simple. Section 1[10] of Act 2 provides a means for "closing" the public schools in a parish. Section 13[11] of the Act provides that the school board may then "lease, sell, or otherwise dispose of, for cash or on terms of credit, any school site, building or facility not used or needed in the operation of any schools within its jurisdiction, on such terms and conditions and for such consideration as the school board shall prescribe." Of course, to the extent that such conveyances, denominated "sales," are for less than the fair value of the property, they are gifts constituting continuing state aid to "private" schools. Presumably, this sale would be made to educational coopera-

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[10]La. R.S. 17:350.1.
[11]La. R.S. 17:350.13.

tives, created pursuant to Act 257 of 1958,[12] which would operate the "private" schools with state money furnished by the grant-in-aid program provided for in Act 3[13] of the Second Extraordinary Session of 1960."

"Under Act 3 of the Second Extraordinary Session of 1960, the parish school boards would continue to supervise the "private" schools, under the State Board of Education, by administering the grant-in-aid program of tuition grants payable from state and local funds. This act is identical with Act 258 of 1958, which was repealed, except that it omits the earlier explanation that tuition grants are available "where no racially separated public school is provided" and it deletes all other references showing its sub-surface purpose. Financial aid is direct from state to school: tuition checks are to be made out by the state jointly to the parent and the school.[15] Under Section 12[16] of

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[12]La. R.S. 17:2801.

[13]La. R.S. 17:2901.

[14]Act 9 of the Second Extraordinary Session of 1961 transfers $2,500,000 from the Public Welfare Fund to the Education Expense Grant Fund for grant-in-aid use, and Act 10 of the same session (La. R.S. 47:318) transfers $200,000 monthly from the sales tax collections to the same fund for the same purpose.

[15]The large number of Catholic schools in Louisiana presented the legislature with an insoluble problem. If the tuition grants are "benefits to the child", and not state support of the schools, the legislation is discriminatory on its face in excluding children attending church schools. If the grants amount to state support of schools support of religious institutions is prohibited by the First Amendment—not to speak of the federal constitutional prohibition against state action in supporting segregated schools or the state prohibition against spending public funds for private purposes.

The amount of each grant may equal the per-day, per-student amount of state and local money expended on public schools during the previous year. It is determined by the governing authority of the

Act 2 in suit, the state would also have the responsibility of furnishing such "private" school children with school lunches and transportation, the cost of which would be borne by the state. The program is to be administered by the State Board of Education, with the assistance of each local board. In addition, in order to insure tenure for the teachers in the "private" schools, Section 1 of Act 4[11] of the Second Extraordinary Session of 1961 empowers the educational cooperatives to enter into contracts of employment with teachers for "terms of at least five years, but not more than ten years." And to protect the salaries of the teachers, school bus drivers, school lunch workers, janitors and other school personnel of the "private" schools, Section 2 of the same Act[12] provides that such salaries shall not be "less than or in excess of any minimum salary schedule or law heretofore

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local school system. The grant application is made to such authority on a form prescribed by the State Board of Education. The grant must be approved by the local authority, but disapproval may be appealed through the Louisiana courts. Payments are to be made jointly to parents and schools, in accordance with regulations prescribed by the State Board of Education. The State Board of Education has general management of the grant funds.

The heavy subsidy private schools would receive suggests the relevance of *Kerr v. Enoch Pratt Free Library of Baltimore City*, 4 Cir., 149 F. 2d 212, cert. denied, 326 U.S. 721. In that case the Court held that a library school, originally private, was converted into a public instrumentality upon receiving a subsidy amounting to 90 percent of its costs. Although other factors were involved, the Court said that since the state had supplied the means of economic existence it had supplied the means by which the school was able to discriminate. Fringe benefits such as free lunches are not analogous to tuition grants.

[11] La. R.S. 17:350.12.

[12] La. R.S. 17:2830.

[13] La. R.S. 17:2831.

adopted by the legislature to govern the salaries or wages of any school teachers, school bus drivers, school lunch workers, janitors or any other school personnel." Acts 9 and 10 were enacted as emergency legislation on the same day Act 2 became law. Act 9 provides for transfer of funds from the Public Welfare Fund to the Education Expense Grant Fund. Act 10 provides for allocation of sales tax revenues to the Education Fund.

Moreover, to make certain that the "private" schools are not interfered with by persons who would accept desegregated education the Legislature adopted Act 3[19] and 5[20] of the Second Extraordinary Session of 1961. Act 3 provides mandatory jail sentences and fines for anyone "bribing" parents to send their children to desegregated schools. It rewards informers who report such action with the money collected in fines. Act 5 provides mandatory jail sentences for anyone inducing parents or school employees to violate state law, that is, by "attending a school in violation of any law of this state." This Act also rewards the informers. The Legislature at the same special session, apparently feeling that the St. Helena Parish School Board as constituted could be trusted to supervise the "private" school program but doubtful about the East Baton Rouge Parish School Board, subject to the same desegregation order as St. Helena, passed Act 7[21] providing for the packing of the East

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[19] La. R.S. 14:119.1.
[20] La. R.S. 17:122.1.
[21] La. R.S. 17:58.

Baton Rouge Parish School Board with appointees of the Governor.

This analysis of Act 2 and related legislation makes it clear that when the Legislature integrated Act 2 with its companion measures, expecially the "private" school acts, as part of a single carefully constructed design, constitutionally the design was self-defeating. Of necessity, the scheme requires such extensive state control, financial aid, and active participation that in operating the program the state would still be providing public education. The state might not be doing business at the old stand; but the state would be participating as the senior, and not silent, partner in the same sort of business. *The continuance of segregation at the state's public-private schools, therefore, is a violation of the equal protection clause.* This would be the case in any parish, should the schools be closed under Act 2. At St. Helena the discrimination would be immediate, obvious, and irreparable. See Appendix A. St. Helena is a poor parish. Its schools receive 97.1 per cent of their operating revenues from the state. We draw a fair inference from the record and facts, of which we may take judicial notice, that it would take extraordinary effort for any accreditable private school to operate in St. Helena without substantial funds and participation from the state. It would be a miracle if a single accreditable private school for Negroes could be established in St. Helena within the foreseeable future. To speak of this law as operating equally is to

equate equal protection with the equality Anatole France spoke of: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[22]

This scheme of the Louisiana Legislature to deny school children constitutional rights is not new. It has been tried before, with similar results.[23] In declaring such a scheme unconstitutional, the Eighth Circuit, in *Aaron v. Cooper*, 261 F.2d 97, 106-107, relied heavily on this pronouncement by the Supreme Court: "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Fourteenth Amendment's command that no State shall deny to any persor within its jurisdiction the equal protection of the Laws." *Cooper v. Aaron*, supra, 19. The ruling here must be the same.

II

Act 2 runs afoul the equal protection clause in another respect. Though its immediate purpose is undoubtedly to circumvent the mandate of *Brown*[24] and our desegregation orders, thereby discriminating specifically against Negro school children, inevitably, *another effect of the statute is to discriminate geographically against all students, white and colored,*

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[22]See *Griffin v. Illinois*, 351 U.S. 12, 23.

[23]"Private" schemes serving to cloak state action violative of the Fifteenth Amendment have also been exposed. See *Terry v. Adams*, 345 U.S. 461; *Smith v. Allwright*, 321 U.S. 649; *Perry v. Cyphers*, 5 Cir., 186 F. 2d 608; *Rice v. Elmore*, supra.

[24]*Brown v. Board of Education*, 347 U.S. 483, 349 U.S. 294.

in St. Helena or any other community where the schools are closed under its provisions.

Applying familiar principles to the admitted facts, that conclusion seems inescapable. Thus, it is clear enough that, absent a reasonable basis for so classifying, a state cannot close the public schools in one area while, at the same time, it maintains schools elsewhere with public funds.[25] And, since Louisiana here offers no justification for closure in St. Helena Parish alone, and no "state of facts reasonably may be conceived to justify it," except only the unlawful purpose to avoid the effect of an outstanding judgment of the court requiring desegregation of the public schools there, it seems obvious that the present classification is invidious, and therefore unconstitutional, even under the generous test of the economic discrimination cases. *See McGowan v. Maryland*, 366 U.S. 420, 425-428, and cases there cited. But defendants reject this simple and direct approach, alleging that it ignores what they deem controlling differences in the present legislation. Accordingly, we must examine the question at greater length.

To distinguish the other school closure cases, particular stress is laid on the local option feature of the statutory plan. Much is claimed for it. Indeed, conceding that a legislative or gubernatorial directive

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[25] *James v. Almond*, E.D. Va., 170 F. Supp. 331, appeal dismissed, 359 U.S. 1006; *Aaron v. McKinley*, E.D. Ark., 173 F. Supp. 944, affirmed sub. nom., *Faubus v. Aaron*, 361 U.S. 197; *Bush v. Orleans Parish School Board*, E.D. La., 187 F. Supp. 42, affirmed, 365 U.S. 569; id., 188 F. Supp. 916, affirmed, 365 U.S. 569.

closing the public schools in only one parish would be constitutionally invalid, defendants nevertheless maintain that there is no denial of equal protection when the same result is achieved through a decision of the local authorities rather than the central state government.* The argument has two faces. First, it is said that the state legislature itself is guilty of no discrimination, since its statute treats all communities alike and imposes school closure on none. Then, changing the focus to the local scene, the contention is that when the parish school authorities close *all* their schools, having dealt impartially with everyone within their limited jurisdiction, they cannot be accused of discriminating. And here defendants cite the swimming pool and park cases. See *Tonkins v. City of Greensboro, North Carolina*, 4 Cir., 276 F.2d 890; *City of Montgomery, Alabama v. Gilmore*, 5 Cir., 277 F.2d 364.

The St. Helena Parish School Board may not be discriminating geographically when it expends the full measure of its power by closing all schools under its control, but that does not make the rule of *Tonkins* and *Gilmore* applicable. Indeed, even if recreation is viewed in the same constitutional light as public education, the rationale of those cases applies only when the facilities sought to be closed are *locally owned*, financed and administered, and the state it-

*Defendants of course concede, as they must, that the act of the local school board is "state action" within the scope of the Fourteenth Amendment. *See Home Tel. & Tel. Co. v. Los Angeles*, 22 U.S. 278.

self is not directly concerned in their operation. See *City of Montgomery, Alabama v. Gilmore*, supra, 368, n. 4. In such case, only local action is involved, and so long as the closure order is general and affects all residents equally, there is no discrimination at any level. But the same principle does not excuse inequalities in a statewide, centrally financed and administered, system of public institutions."

There can be no doubt about the character of education in Louisiana as a state, and not a local, function. The Louisiana public school system is administered on a statewide basis, financed out of funds collected on a statewide basis, under the control and supervision of public officials exercising statewide authority under the Louisiana Constitution and appropriate state legislation. The State Supreme Court has said so emphatically:

> "**** Public education is declared by the constitution to be an affair of the state, and it assumes the whole responsibility of public education.***" *Nelson v. Mayor, etc., of Town of Homer*, 48 La. Ann. 258, 19 So. 271.

Again in *Hill v. DeSoto Parish School Board*, 177 La. 329, 148 So. 248, 250:

> "Under article 12 of the Constitution, section 1, *(free public schools are part of the educational system of the state.*Q In section 10 of that article it is provided that 'The Legislature shall provide for the creation and election of parish school

[Q] See cases cited in Note 25.

> boards which shall elect parish superintendents for their respective parishes.' Pursuant to this mandate, the Legislature of 1922, by Act No. 100, § 17, created a parish school board for each of the parishes of the state and constituted them bodies corporate in law with full power and authority to make rules and regulations for their own government not inconsistent with the rules and regulations of the state board of education. (These boards are public corporations and are created for the purpose of administering *for the state* the public school affairs of their respective parishes. Their functions are purely of a public character. In matters relating to the free public schools of their parishes, they are the governing authorities not only for the parish as a whole, but for each and all such school districts as may be created. *They are state agencies, a part of the state government.****" (Emphasis added.)

See *State v. City of New Orleans*, 42 La.Ann. 92, 7 So. 674, 677; *State v. Barham*, 173 La. 488, 137 So. 862, 864; *Singelmann v. Davis*, 240 La. 929, 125 So. 2d 414, 417. See also Appendix A.

Despite defendants' argument to the contrary, none of the recent amendments to Article XII of the Louisiana Constitution have affected the control of public education by the state. See Acts 747 and 752 of 1954; Act 557 of 1958. Indeed, in its most recent form, that Article still provides for a single state system:

> "The Legislature shall have full authority to make provisions for the education of the school children of this State and/or for an educational

> system which shall include all public schools and all institutions of learning operated by State agencies.***"
>
> La. Const., Art. XII, § 1.

Public education remains the concern of the central state government, and ultimate control ..... rests with the State Legislature and the State Department of Education. The best proof of this is in the recent history of the New Orleans schools. See cases cited in Note 4, and *State v. Orleans Parish School Board*, La.App., 118 So. 2d 471; *Singelmann v. Davis*, supra. See also La. R.S. 17:1-20; La. R.S. 17:151-166; La. R.S. 17:221-232; La. R.S. 17:261-268; La. R.S. 17:-335, 349.4; La. R.S. 17:351-395.6; La. R.S. 17:411-430; La. R.S. 17:441-1304. Nor does Act 2, here involved, change the status of the public school system. Except in the matter of closure, there has been no decentralization; and where closure is ordered under Act 2, the elaborate state-controlled discriminatory scheme, described in Part I hereof, goes into effect. The funds, the supervision, the accreditation, still come from the state.* The plain fact is that the state has not even made a pretense of abandoning its control of education to autonomous subdivisions.

In these circumstances, the true focus is not on the doings of any board, but rather on the action of the state government. The discriminatory scheme embodied in Act 2 originated there. It is true that the Legislature has *imposed* no inequality, but its instru-

*See Appendix A.

ment encourages it, expressly permits it. And that is equally condemned." * * * no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be." *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715, 725 See also *Terry v. Adams*, supra, 469 (opinion of Mr. Justice Black). Applying the rule of *Brown* to geographical discrimination, "All provisions of federal, state, or local law requiring *or permitting* such discrimination must yield to this principle." (Emphasis added.) *Brown v. Board of Education*, 349 U.S. 294, 298.

The equal protection clause speaks to the state. The United States Constitution recognizes no governing unit except the federal government and the state. A contrary position would allow a state to evade its constitutional responsibility by carve-outs of small units. At least in the area of declared constitutional rights, and specifically with respect to education, the state can no more delegate to its subdivisions a power to discriminate than it can itself directly establish inequalities. When a parish wants to lock its school doors, the state must turn the key. If the rule were otherwise, the great guarantee of the equal protection clause would be meaningless.

The consequence is that the local option device cannot save Act 2. Nothing in the cases cited by defendants suggests that it can. Indeed, in upholding local option liquor laws in *Rippey v. Texas*, 193 U.S. 504, and *Lloyd v. Dollison*, 194 U.S. 445, the Court

specifically rests its decision not on the local option feature of the challenged legislation but, expressly, on the proposition that the same result would be constitutionally permissible if achieved by direct action of the legislature, because "The State has absolute power over the subject." 193 U.S. at 510; 194 U.S. at 448-449. The crucial question goes to the substance of the legislation that is being enacted by the local option device. If it violates the equal protection clause or any other constitutional provision, enactment by local option will not save it. More recently, the Court has emphasized that whenever differences are constitutionally inoffensive, it is immaterial how they come into being, whether by local option or through a classification made at the central legislative level. See *Ft. Smith Light Co. v. Paving Dist.*, 274 U.S. 387, 391; *Salsburg v. Maryland*, 346 U.S. 545, 552-553.[29] In short, whatever inequalities result from the implementation of Act 2 must be attributed directly to the Louisiana Legislature. As defendants themselves concede, whatever may be the rule with regard to the privilege of dispensing alcoholic beverages, the state itself cannot discriminate in the

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[29]The holding of Salsburg v. Maryland permitting the state to treat differently, for different localities, the rule against admissibility of illegally obtained evidence no longer obtains in view of *Mapp v. Ohio*, 367 U.S. 643. Accordingly, reliance on that decision for the proposition that there is no constitutional inhibition to geographic discrimination in the area of civil rights is misplaced. Salsburg was not a local option case, for it involved simply an endorsement of the classification made by the legislature itself in treating its subdivisions; the Court emphasized that the matter was purely "procedural" and "local." Here, the substantive classification is discriminatory, and reliance is had on local option to save the legislation.

field of education. There is, of course, greater freedom to classify geographically when the state is regulating a private activity than when it is conferring a governmental benefit. When the state provides a benefit, it must do so evenhandedly. "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown v. Board of Education*, 347 U.S. 483, 493.

There can be no question about the actual inequality in educational opportunities that will follow closure of the public schools in St. Helena Parish, or any other community that invokes the Act. Grants-in-aid, no matter how generous, are not an adequate substitute for public schools. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337. If a private school system could be established in St. Helena under the aegis of the state, there would still be lacking the organizational and administrative advantages, as well as economies, of operating as a member of a state system. There would be a total lack of the accreditation that is automatic in the case of a public school but absent in the case of a private school except when the school has met educational standards over a period of years. Moreover, under the Louisiana plan these subsidies would afford entry to segregated schools alone. See *James v. Almond*, supra, 337. Compare *Allen v. County School Board of Prince Edward County*, S.D. Va., ... F.Supp. ..... (8 25 61).

Finally, the requirement of a popular referendum on the question of closure adds nothing to the chal-

lenged statute. One of the purposes of the Constitution of the United States was to protect minorities from the occasional tyranny of majorities. No plebiscite can legalize an unjust discrimination.[30] "One's right to life, liberty, and property * * * and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Board of Education v. Barnette*, 319 U.S. 624, 638. See *Boson v. Rippy*, 5 Cir., 285 F.2d 43, 45.

This is not the moment in history for a state to experiment with igorance. When it does, it must expect close scrutiny of the experiment. For the reasons stated, we conclude that Act 2 of the Second Extraordinary Session of the Louisiana Legislature for 1961 is unconstitutional. The court will prepare a temporary injunction restraining its enforcement.

/s/John Minor Wisdom,
United States Circuit Judge

/s/Herbert W. Christenberry,
United States District Judge

/s/J. Skelly Wright,
United States District Judge

New Orleans, Louisiana
August 30, 1961

[30] No one in the Louisiana Legislature could have considered an election under Act 2 as a bona fide local option or as a popular referendum. Published reports for St. Helena showed 1461 white and 111 negro voters eligible to vote. Election returns showed 1147 votes for and 56 against authorizing the School Board to close the schools. This is like having only the cats vote on a program for kittens and young mice. "The right of negroes to attend the public schools without discrimination upon the ground of race cannot be made to depend upon the consent of the members of the majority race." *Kelley v. Board of Education of City of Nashville*, M.D. Tenn., 159 F. Supp. 272, 278.

Appendix A

The legislative program for closing those public schools under court order to desegregate (the schools reopening as segregated private schools subsidized by the state) has an inseparable connection with certain background facts. Although these facts are in the background they dominate the picture as a whole and especially dominate the St. Helena scene. All are within a proper factual frame of reference for an understanding of the picture.

The red dirt hills of St. Helena Parish are on the Mississippi state line, east of East Feliciana Parish, west of Tangipahoa Parish, north of Livingston Parish, and about one hundred miles north-northwest of New Orleans. According to the 1960 census, St. Helena has a population of 9,162, an increase of 79 over 1950. There are 4076 white persons and 5086 colored persons in the parish. The largest community, Greensburg, has a population of about 425. The Louisiana Almanac and Fact Book (1956), describing St. Helena, states: "St. Helena is the center of short leaf and loblolly pine production. The principal crops are cotton and corn." See also Rand McNally Commercial Atlas (1960) p. 192. In an earlier proceeding the district attorney for St. Helena Parish told the court: "St. Helena is strictly a country parish with no industries whatsoever, where the only industries are welfare and politics." The estimated 1960 per capita income (after taxes) of St. Helena was $894 against $1474 for the state and $1974 for the nation. Sales

Management Annual Survey of Buying Power, May 10, 1961, pp. 156, 157, 690. Figures for 1960 show 852 public welfare grants to 1325 persons in St. Helena at an annual cost of $768,000. Louisiana Public Welfare Statistics, State of Louisiana Public Welfare Department, June 1961, Table 14, p. 20.

All of Louisiana's parishes receive substantial support from the state: a total for all parishes of 77 percent, 72 percent through direct support and 5 percent through state payment of school taxes on exempt homesteads. In 1957-58 state support of school operations amounted to 85 percent of operating revenues, 82 percent through direct state support for school operations. In 1957-58 only two of Louisiana's 67 school systems provided more than 30 percent of their operating revenues from local sources. In 1957-58 St. Helena received 97.1 percent of its public school operating revenues from state and federal sources; only two other parishes received a greater percentage of non-local aid to public schools. See Financing Public Schools, a PAR study published by the Public Affairs Reserch Council of Louisiana (1959) p. 11, 12, 30-31. See also Circular No. 4615, Aug. 20, 1960, Louisiana State Department of Education and Bulletins 887 and 904 of the Louisiana State Department of Education.

The Louisiana Constitution (Article 12, Section 14) requires three-fourths of the State Public School Fund to be distributed to the parish school boards in the proportion that the number of educable children,

from six to eighteen years of age inclusive, bears to the total number of such educable children in the state. The affidavit of J. L. Meadows, Superintendent of the St. Helena Parish School Board filed in the record, shows that for 1959-60 St. Helena received from this fund $159,280. The other one-fourth of the State Public School Fund, known as the "Equalization Distribution Fund", assures sufficient revenues to permit every parish school system to maintain a minimum or foundation educational program. The approved formula for distributing this fund is under the State Board of Education and is established under rules and regulations set forth in the Constitution of Louisiana, Article XII, Section 14. Mr. Meadows stated that the St. Helena School Board received $683,312 from this fund for 1960-61; $20,000 from other state sources; and $24,774 from the five mill ad valorem tax authorized for the operation and maintenance of the schools in St. Helena. According to Mr. Meadows, for 1958-59 the St. Helena School Board had a deficit of $110,000.

Bulletin 904, the 110th Annual Report of the State Department of Education of Louisiana 1958-59 shows that the St. Helena School Board received $901,080 from state, federal, and special sources: (Table 111, p.173) $47,548 from parish sources (Table 111, p. 177). Total expenditures, balances, and overdrafts for 1958-59 amounted to $1,363,009 (Table 111. p. 261).

As of January 30, 1959, the annual inventory of

Louisiana Public School property, published by the State Department of Education, showed $344,067,058 as the total cost of the buildings, sites, and equipment for all white schools, and $131,255,672 for all negro schools; $555,711 for white schools in St. Helena and $483,308 for negro schools. Bulletin 904, Department of Education, Table XIII, pp. 319-320.

The total indebtedness as of June 30, 1959, of all school boards in the 67 school districts in Louisiana was $325,007,869; $961,773 in St. Helena, secured by a special tax for construction. Bulletin No. 904, Department of Education, Table VII, p. 279.

There are very few private schools in Louisiana except in parishes having a large Catholic population. There are no private schools for white or negro students in St. Helena and none in the adjacent parishes (except for three Catholic elementary schools for white students in Tangipahoa). See Louisiana School Directory, Session 1960-61, Bulletin No. 923, State Department of Education of Louisiana.

There is a close correlation between the statewide effort to raise the educational level in Louisiana and the necessity for state aid to parishes having a sub-par econcomy. Among the fifty states, in terms of percentage, Louisiana ranks 50th from the top in the number of its citizens, 25 years or older, having five years schooling; 44th in the number of persons having four years of high school; 48th in the success of its citizens in passing Selective Service Mental Tests; 48th in those 14 years or older able to read.

But in 1959 it ranked first among the states in the ratio of state expenditures for schools to personal income; seventh in the ratio of state revenues to state aid to schools; third in the estimated revenue from state sources per instructional staff member ($6,678); and fifth in revenues from state sources per pupil ($298). Research Report 1960-R1, Ranking of the States, National Education Association. This mighty effort on the part of Louisiana is a phase of the educational problem that is often overlooked. Continuance of the effort at comparable level by private persons, commendable as it might be, would impose a disproportionately heavy burden on such parishes as St. Helena.

These statistics demonstrate beyond a doubt that public education in Louisiana is not, as the defendant contends, a matter of local concern. The system is based on the concern of the whole state for all its citizens. It could not have developed without the state; it could not have been operated except by the state. A parish such as St. Helena receives 97.1 percent state (and some federal) help because the state as a whole has a direct interest in equalizing educational opportunities so as to aid under-privileged parishes. St. Helena receives $405.73 from the state for each pupil (taking the average daily attendance) as against $332.33 the Orleans Parish School Board receives per pupil—because the state is not willing to allow the St. Helena schoo. children to receive an edu-

cation inferior to the education offered school children in New Orleans.

These then are dominating facts: (1) there are no existing private schools in St. Helena; (2) adequate facilities, buildings, and equipment, to be anywhere nearly equivalent to existing public school facilities would cost in excess of one million dollars; (3) the present annual local contribution of $47,000 is a far below the present annual operating expense of over a million dollars; (4) excluding fringe expenses, in order to equal the allowance the state now turns over to St. Helena, tuition for each child would amount to $405.73. It is dead certain, therefore, that absent active, extensive unconstitutional state support of private schools, closing of public schools in St. Helena under Act 2 will mean the end of school education for all children in the parish, white and negro, except a handful of well-to-do white children. This then is the legislature's option: segregated schools contrary to the equal protection clause—or no schools.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

No. 1068 CIVIL ACTION

LAWRENCE HALL, ET AL, PLAINTIFFS

v.

ST. HELENA PARISH SCHOOL BOARD, ET AL, DEFENDANTS

TEMPORARY INJUNCTION

This case came on for hearing on motion of the plaintiffs for temporary injunction, restraining the enforcement of Act 2 of the Second Extraordinary Session of the Louisiana Legislature for 1961.

It being the opinion of this court that all Louisiana statutes which would directly or indirectly require or permit segregation of the races in the public schools are unconstitutional, in particular, the aforesaid Act 2.

IT IS ORDERED that the St. Helena Parish School Board and the members thereof, J. H. Meadows, St. Helena Parish Superintendent of Schools, their successors, agents, representatives, attorneys, and all other persons who are acting or may act in concert with them, be, and they are hereby, restrained, enjoined and prohibited from enforcing or seeking to enforce by any means the provisions of Act 2 of the Second Extraordinary Session of the Louisiana Legislature for 1961.

IT IS FURTHER ORDERED that copies of this temporary injunction shall be served forthwith upon

each of the defendants named herein.

IT IS FURTHER ORDERED that the plaintiffs herein file a bond in the amount of One Hundred Dollars ($100) as required by Rule 65(c), F.R.Civ.P.

/s/John Minor Wisdom,
United States Circuit Judge.

/s/Herbert W. Christenberry,
United States District Judge.

/s/J. Skelly Wright,
United States District Judge.

New Orleans, Louisiana

August 30, 1961.

APPENDIX "B"

ACT 2

HOUSE BILL NO. 1

An Act to provide that in each parish of the state and each municipality having a municipally operated school system, the school board shall have authority to suspend or close the operation of the public school system in the elementary and secondary grades after an election has first been held at which a majority of the qualified voters voting in said election have authorized such suspension or closing; to provide that such election shall be held in accordance with the general election laws of the state; to make provision relative to the calling of said election; to provide for the manner in which the suspension of such operation of the public school system in such grades may be terminated; to provide the content of the propositions appearing on the ballot in such election; to provide for the promulgation of the returns of said election; to provide that this Act shall not limit the authority of school boards to provide school lunches, transportation of school children or grant-in-aid scholarships to children in attendance at private schools; to authorize the lease or sale of any school property by parish or city school boards; to provide that this Act shall be in addition to other laws on the same subject matter and shall not be held to repeal same; to authorize the abolition of school taxes by school boards, except taxes dedicated and needed to retire outstanding school bonds in parishes and municipalities where the suspension or closure of the public schools has been authorized by vote of the qualified electors;

and to make provision for the effective date of this Act.

Be it enacted by the Legislature of Louisiana:

Section 1.

In each parish of the state, and in each municipality having a municipally operated school system, the school board shall have authority to suspend or close, by proper resolution, the operation of the public school system in the elementary and secondary grades in said parish or municipality, but no such resolution shall be adopted by any such board until the question of suspending or closing the operation of such public school system in such grades shall have been submitted to the qualified electors of the parish or municipality, as the case may be, at an election conducted in accordance with the general election laws of the state, and the majority of those voting in said election shall have voted in favor of suspending or closing the operation of such public school system.

Section 2.

The election provided for in Section 1, of this Act may be called by each parish or municipal school board on its own initiative, but upon the petition of ten per cent of the qualified electors of said parish or municipality, as the case may be, the school board shall call said election within ten (10) days after the date on which the petition is received by said board. The board shall determine and fix the date on which such election shall be held, which date shall be not less

than thirty (30) nor more than sixty (60) days after the date on which the election is called.

Upon failure of the school board to call and fix the date of said election as above provided, the Parish Board of Supervisors of Elections may issue a proclamation to provide therefor.

Section 3.

The petition referred to in the preceding Section shall be addressed to the parish or municipal school board, as the case may be, and shall be in substantially the following form:

PETITION

TO: (Name of parish or municipal school board)

The undersigned qualified electors respectfully request that you call an election to submit, in the manner provided by law, to the qualified electors of ..... Parish (or municipality in case the school system is operated by a municipal school board), the following proposition:

TO AUTHORIZE THE ..... PARISH (or municipal) SCHOOL BOARD TO SUSPEND OR CLOSE THE OPERATION OF THE PUBLIC SCHOOL SYSTEM IN THE ELEMENTARY AND SECONDARY GRADES IN SAID PARISH (or municipality in case of a municipally operated school system).

Signature	Address	Date

Signatures may be made on more than one sheet

of paper but each such sheet of any such petition shall reproduce above the signatures the same matter as is on the first sheet. Each qualified elector signing such petition shall sign his or her own name in his or her own handwriting and shall write his or her address and the date on which his or her signature was affixed.

Section 4.

The petition, or petitions, shall be filed with the Registrar of Voters and when so filed shall become a public record and cannot be returned to the proponents or signers thereof.

The Registrar of Voters shall cause the petition to be published in the Official Journal of the parish or municipality, as the case may be, at the earliest possible time. The expense of such publication shall be paid by the school board to which the petition is addressed. Where multiple petitions are submitted, the portion appearing above the signatures shall be reproduced only once in the publication.

Section 5.

The Registrar of Voters shall examine the petition and attach thereto his sworn verification showing:

(1) The date the petition was filed in his office;

(2) Copy of the Official Journal showing publication of the Petition;

(3) The number of qualified electors of the parish or municipality, as the case may be, on the registration rolls as of the date of the filing of the petition,

which date shall be used by him in ascertaining whether the petition contains the required number of signatures;

(4) That he has examined each signature for its genuineness by comparing the signature on the petition with the signature of the same person on the registration rolls;

(5) The total number of genuine signatures of qualified electors on the petition; and

(6) The number of signatures on said petition which are not genuine.

The said Registrar of Voters shall file the petition, with his sworn verification, with the school board to which it is addressed.

Section 6.

The school board with which the petition is filed by the Registrar of Voters shall endorse or cause to be endorsed thereon the day, month and year the petition was received by said board.

If the petition conforms to the provisions of this Act, said board shall order the election by proper resolution. Said resolution may be adopted at either a regular or special meeting of said board, held not less than ten (10) days after the date on which the petition was received from the Registrar of Voters.

Section 7.

When the election provided for in this Act has been ordered, the following propositions, and no others, shall be printed upon the ballot:

FOR the proposition to authorize the ..... Parish (or municipal) School Board to suspend or close the operation of the public school system in the elementary and secondary grades in said parish (or municipality in case of a municipally operated school system).

AGAINST the proposition to authorize the ..... Parish (or municipal) School Board to suspend or close the operation of the public school system in the elementary and secondary grades in said parish (or municipality in case of a municipally operated school system).

Voting machines shall be used in such election in the manner provided by the voting machine laws contained in Chapter 5 of Title 18 of the Louisiana Revised Statutes of 1950.

Section 8.

The election provided for in this Act shall be supervised by the Board of Supervisors of Elections for the parish in which the election is called. Said Board of Supervisors shall appoint three commissioners and one clerk to preside over the election at each polling precinct. These appointees shall be qualified electors and residents of the precinct in which they serve.

Section 9.

The board calling the election shall promulgate the result thereof by resolution adopted at its first regular or special meeting following the date of the

election and shall publish said result in the official Journal of the parish or municipality, as the case may be.

Section 10.

Except as otherwise specifically provided in this Act, the provisions of the general election laws of this state shall govern the call, conduct and promulgation of the result of any election held pursuant to the authority contained in this Act.

Section 11.

Each parish or municipal school board which has suspended the operation of the public school system in the elementary and secondary grades pursuant to the authority contained in this Act, may terminate such suspension and resume the operation of such school system only after having been authorized to do so by a further election to which all of the provisions of this Act shall be applicable except that the propositions printed upon the ballot shall be as follows:

FOR the termination of the suspension of the operation of the public school system in the elementary and secondary grades in ..... Parish (or municipality in case of a municipally operated school system).

AGAINST the termination of the suspension of the operation of the public school system in the elementary and secondary grades in ..... Parish (or municipality in case of a municipally operated school system).

Section 12.

Nothing contained in this Act shall operate or be construed to limit or impair the authority of any school board to provide school lunches, transportation of school children or grant-in-aid scholarships to children in attendance at private schools.

Section 13.

Any parish or city school boards may lease, sell, or otherwise dispose of, for cash or on terms of credit, any school site, building or facility not used or needed in the operation of any schools within its jurisdiction, on such terms and conditions and for such consideration as the school board shall prescribe.

Section 14.

School boards, in parishes or municipalities in which such election to suspend or close the public schools is carried by a majority of the votes cast therein, may close their schools and may thereafter abolish school taxes, except such taxes as are dedicated and needed to service and retire their outstanding school bonds.

Section 15.

If any part or parts, Section, sentence, clause or phrase of this Act, or the application thereof, to any person or circumstance, is for any reason declared unconstitutional, such declaration shall not affect the validity of the remaining portions of this Act which shall remain in force as if such Act had been enacted with the unconstitutional part or parts, Section, sen-

tence, clause, phrase, or such application thereof eliminated, and to this end the provisions of this Act are declared to be severable; and the Legislature of Louisiana hereby declares that it would have enacted this Act if such unconstitutional part or parts had not been included herein, or if such application had not been made.

The provisions of this Act are in addition to other laws on the same subject matter and shall not be held to repeal same except in a case of conflict and then only to the extent of such conflict.

Section 16.

The necessity for the immediate passage of this Act having been certified by the Governor to the Legislature while in session, in accordance with Section 27 of Article III of the Constitution of Louisiana, this Act shall become effective immediately upon approval by the Governor.

Approved: February 20, 1961 at 11:35 A.M.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

CIVIL ACTION No. 1068

LAWRENCE HALL, ET AL., PLAINTIFFS

V.

ST. HELENA PARISH SCHOOL BOARD, AND J. L. MEADOWS, SUPERINTENDENT, DEFENDANTS.

ORDER ADDING PARTIES DEFENDANT

IT APPEARING from the motion of the United States *amicus curiae* herein, that it is in the interest of justice to add as parties defendant in this action the STATE OF LOUISIANA; JIMMIE H. DAVIS, Governor of Louisiana; JACK P. F. GREMILLION, Attorney General of Louisiana; MURPHY J. RODEN, Director of Public Safety of Louisiana; DUNCAN S. KEMP, District Attorney of St. Helena Parish; and R. D. BRIDGES, Sheriff of St. Helena Parish,

IT IS ORDERED that each of them be and they are hereby added as parties defendant in this action, and the marshal is directed to serve upon each of them a copy of this order together with a copy of the motion and petition of the United States.

New Orleans, Louisiana, March 17th 1961.

/s/J. Skelly Wright
United States District Judge

2605-B, 10-61

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SUPREME COURT, U. S.

Office Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. 586

ST. HELENA PARISH SCHOOL BOARD, *et al.*,

Appellants,

—v.—

LAWRENCE HALL, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

MOTION TO AFFIRM AS TO CERTAIN APPELLANTS AND TO DISMISS OR AFFIRM AS TO OTHERS

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IN THE

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October Term, 1961

No. 586

ST. HELENA PARISH SCHOOL BOARD, *et al.*,

Appellants,

—v.—

LAWRENCE HALL, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

MOTION TO AFFIRM AS TO CERTAIN APPELLANTS AND TO DISMISS OR AFFIRM AS TO OTHERS

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the order of the District Court entered on August 30, 1961, be affirmed as to the appellants St. Helena Parish School Board and the members thereof, and J. H. Meadows, St. Helena Parish Superintendent of Schools, their successors, agents, representatives, attorneys, and all other persons who are acting or may act in concert with them, on the ground that the questions presented by their appeal are so unsubstantial as not to warrant further argument.

Appellees further move that the appeal of the appellants State of Louisiana, Jack P. F. Gremillion, Attorney General of Louisiana; Murphy J. Roden, Director of Public

Safety of Louisiana; Duncan S. Kemp, District Attorney of St. Helena Parish, Louisiana, and R. D. Bridges, Sheriff of St. Helena Parish, Louisiana, be dismissed because their appeal is not within the jurisdiction of this Court, or in the alternative, that the judgment against the last mentioned parties should be affirmed.

Statement

The original complaint in this action was filed on September 4, 1952, seeking injunctive and declaratory relief against racial segregation in the public schools of St. Helena Parish. On May 25, 1960, an order was entered by the United States District Court for the Eastern District of Louisiana, Baton Rouge Division, enjoining appellant School Board, its members, and Superintendent, "from requiring segregation of the races in any school under their supervision, and from engaging in any and all action which limits or affects the admission to, attendance in, or education of plaintiffs or any other Negro child similarly situated in schools under defendants' jurisdiction, on the basis of race or color, from and after such time as may be necessary to make arrangement for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed as required by the decision of the Supreme Court in *Brown* v. *Board of Education*, 349 U. S. 294." On appellants' appeal this order was affirmed by the United States Court of Appeals on February 9, 1961. *St. Helena Parish School Board* v. *Hall*, 287 F. 2d 376 (5th Cir. 1961), cert. denied 7 L. ed. 2d 33 (1961).

On February 9, 1961, the day of affirmance by the Court of Appeals, the Governor of Louisiana called the Second Extraordinary Session of the Louisiana Legislature for 1961 into session to act "relative to the education of the

school children of the State . . . for the preservation and protection" of state sovereignty. This session enacted Act No. 2,[1] the law involved in this suit, and other related legislation designed to continue racial segregation in the public schools of the State of Louisiana. On February 20, 1961, Act No. 2 became law. This Act provides in pertinent part that "in each parish of the State and in each municipality having a municipally operated school system, the school board shall have authority to suspend or close the operation of the public school system in the elementary and secondary grades after an election has first been held at which a majority of the qualified voters voting in said election have authorized such suspension or closing"; that such election may be called on the initiative of a school board or on petition of ten percent of the qualified electorate; that when the operation of schools is suspended in accordance with such an election it may not be resumed unless approved after a further election; and that when schools are closed the school board may lease or sell school sites, buildings and property, and abolish school taxes.

On March 2, 1961, the appellant St. Helena Parish School Board, on its own initiative, resolved to call an election pursuant to Act No. 2, such election to be held on April 22, 1961, for the purpose of determining whether to authorize the appellant Board to suspend or close the public elementary and secondary schools of said parish.

On March 16, 1961, appellees filed a supplemental complaint asking the Court to restrain the St. Helena Parish School Board and its Superintendent of Schools from enforcing Act No. 2.

On March 17, 1961, the United States applied for an order designating it as *amicus curiae*, for an injunction

[1] La. R.S. 17:350.

to restrain the enforcement of Acts No. 3 and 5 of the Second Extraordinary Session and for an order adding as parties defendant in the case, the State of Louisiana, the Governor, Attorney General, and Director of Public Safety of Louisiana, and the District Attorney and Sheriff of St. Helena Parish. The United States requested no relief involving Act No. 2 in this petition.

On April 14, 1961, the Court invited counsel for all parties and the United States as *amicus curiae* to file briefs presenting their views on various questions propounded by the Court. The United States submitted a brief discussing the constitutionality of Act No. 2 and concluding that it was unconstitutional. The United States did not file a complaint, motion or petition praying for relief against any defendant concerning Act No. 2.

On August 30, 1961, in an opinion, signed by Judges Wisdom, Christenberry and Wright, the Court held Act No. 2 violative of the equal protection clause of the Fourteenth Amendment on two alternative grounds:

> Most immediately, it is a transparent artifice designed to deny the plaintiffs their declared constitutional right to attend desegregated public schools. More generally, the Act is assailable because its application in one parish, while the state provides public schools elsewhere, would unfairly discriminate against the residents of that parish, irrespective of race (Opinion of the District Court as set forth in Jurisdictional Statement, pp. 33-34).

On August 30, 1961, the three-judge United States District Court for the Eastern District of Louisiana, Baton Rouge Division, entered its judgment, which judgment declared Act No. 2 unconstitutional and enjoined defendants St. Helena Parish School Board and the members thereof,

and J. H. Meadows, St. Helena Parish Superintendent of Schools, their successors, agents, representatives, attorneys, and all other persons who are acting or may act in concert with them from enforcing or seeking to enforce by any means the provisions of Act No. 2 of the Second Extraordinary Session of the Louisiana Legislature for 1961. The order of August 30, 1961 granted no relief against the other defendants added upon motion of the United States.

On September 11, 1961, appellants filed a Notice of Appeal to this Court in the United States District Court, Eastern District of Louisiana, Baton Rouge Division. On December 5, 1961, appellants filed their jurisdictional statement in this Court.

ARGUMENT

I. The Motion to Dismiss

The appeal of the State of Louisiana, Jack P. F. Gremillion, Attorney General of Louisiana; Murphy J. Roden, Director of Public Safety of Louisiana; Duncan S. Kemp, District Attorney of St. Helena Parish, Louisiana, and R. D. Bridges, Sheriff of St. Helena Parish, Louisiana, should be dismissed in that it is not within the jurisdiction of this Court because not taken in conformity with the applicable statute, namely, 28 U. S. C. §1253.

The order of August 30, 1961, did not grant any injunction or any other relief against the parties mentioned above. The only parties mentioned in that order were the St. Helena Parish School Board and the members thereof, and J. H. Meadows, St. Helena Parish Superintendent of Schools. (In addition, the order contained the usual reference to agents, attorneys and persons acting in concert with the named parties. Rule 65, Federal Rules of Civil Pro-

cedure.) None of the above-mentioned parties have been restrained from taking any action with respect to Act No. 2 of the Second Extraordinary Session of the Louisiana Legislature for 1961 in this proceeding (unless, of course, they are acting in concert with the named parties) and it appears from the Act itself that none of these parties have any rights or duties under Act No. 2.

The State of Louisiana and the other parties mentioned above were added as defendants in this action on March 17, 1961 (Jurisdictional Statement, p. 7) upon the request of the United States that it be allowed to participate in the action in the interest of justice as *amicus curiae* and upon the request of the United States that these parties be added as defendants. The motion filed by the United States on March 17, 1961 (granted by the order of that date) related exclusively to Acts Nos. 3 and 5 of the Second Extraordinary Session of the Louisiana Legislature for 1961.[2] The Government's petition for an injunction to restrain the enforcement of Acts Nos. 3 and 5 of the Second Extraordinary Session, was entirely separate and distinct from the supplemental complaint filed by the plaintiffs Lawrence Hall, et al., which sought an injunction to restrain the St. Helena Parish School Board and J. H. Meadows from enforcing Act No. 2 of the Second Extraordinary Session of 1961. The temporary injunction issued by the court below does not mention Acts Nos. 3 and 5 and does not purport to enjoin the enforcement nor does that order

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[2] Act No. 3 punishes those who give or accept, or offer to give or accept "bribes" ("money or anything of apparent or prospective value") to parents, tutors, guardians, etc., in order to "encourage, influence, prompt, reward or compensate" them for permitting a child to go to a desegregated public school.

Act No. 5 provides criminal penalties for any act done to a child in a public school, or to his parents, etc., the purpose of which is to cause such person or teacher, principal or other school employee to participate in public school desegregation.

enjoin the State of Louisiana, its Attorney General, its Director of Public Safety or the District Attorney or Sheriff of St. Helena Parish, Louisiana. It is therefore apparent that the appeal by the above mentioned parties from the order of August 30, 1961, is not within the jurisdiction of this Court and should be dismissed. See *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632.

II. Motion to Affirm

The decision of the court below is plainly correct and it is manifest that the questions upon which the decision of the cause depends are so unsubstantial in the light of the prior decisions of this Court as not to need further argument.

A.—The appellants' objection to the participation of the United States as *amicus curiae* in this litigation is plainly without merit. The only relief granted against the defendants by the order of August 30, 1961, was that requested by appellees Lawrence Hall, et al., in their supplemental complaint. The role of the United States in the litigation with respect to Act No. 2 was that of *amicus curiae* in the conventional sense. The United States as *amicus* briefed the issues, as did several state attorneys general, following the invitation of the trial court in its order of April 14, 1961. The United States has often participated in litigation involving racial discrimination as a friend of the court with the approval of this Court. See *Brown* v. *Board of Education*, 347 U. S. 483 and 349 U. S. 294; *Cooper* v. *Aaron*, 358 U. S. 1. However, the propriety of action by the United States as *amicus curiae* in actively intervening in such actions and advancing motions and applications for injunctions has been settled in related litigation where objections were raised by Louisiana officials to participation by the United States in school segre-

gation litigation. That issue was thoroughly discussed by a three-judge District Court in *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871, 875-878 (E. D. La., March 3, 1961); and that decision was affirmed by this Court in its last term *sub nom. Legislature of Louisiana* v. *United States*, 367 U. S. 908; *Denny* v. *Bush*, 367 U. S. 908; and *Tugwell* v. *Bush*, 367 U. S. 907. See also, *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861, 866 fn. 9 (E. D. La., Dec. 21, 1960), affirmed *sub nom. Legislature of Louisiana* v. *Bush*, 365 U. S. 569 (No. 706, Oct. Term 1960). In any event, the fact that the appellees sought the same relief urged by the United States below would make unnecessary a determination of the authority of the United States to seek affirmative relief as *amicus curiae*. Cf. *Faubus* v. *United States*, 254 F. 2d 797 (8th Cir. 1958), cert. denied 358 U. S. 829.

B. The appellants' argument that this is a suit against the State and thus forbidden by the Eleventh Amendment of the United States Constitution is plainly without merit. This argument has been repeatedly advanced in similar cases, including other aspects of this case, and repeatedly rejected. See *St. Helena Parish School Board* v. *Hall*, 287 F. 2d 376, 377 (5th Cir. 1961), cert. denied 7 L. ed. 2d 33 (1961); *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (5th Cir. 1957), cert. denied 354 U. S. 921; *Board of Supervisors of Louisiana State University* v. *Fleming*, 265 F. 2d 736 (5th Cir. 1959); *Dorsey* v. *State Athletic Commission*, 168 F. Supp. 149 (E. D. La. 1958), affirmed 359 U. S. 533; *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, 922 (E. D. La. 1960), aff'd *sub nom. Orleans Parish School Board* v. *Bush*, 365 U. S. 569; *Ex parte Young*, 209 U. S. 123.

C. The decision below correctly enjoined appellants St. Helena Parish School Board and the members thereof,

J. H. Meadows, St. Helena Parish Superintendent of Schools, their successors, agents, representatives, attorneys and others acting in concert with them from enforcing by any means the provisions of Act 2 of the Second Extraordinary Session of the Louisiana Legislature for 1961, and therefore should be affirmed as to them. Act No. 2 (Appellants' Jurisdictional Statement, p. 61) provides that in each parish of the state the school board shall have authority to suspend or close the operation of the public school system in the elementary and secondary grades following a public referendum which may be called by each parish board on its own initiative, or upon petition of 10% of the qualified electors. Such an election was held at the initiative of the board. 1,461 white and 111 Negroes were eligible to vote; 1,147 votes were cast for and 56 against, authorizing appellant school board to close the schools (Opinion of the Court below, Appellants' Jurisdictional Statement p. 52, note 30).

Closing the schools in the context of the history of this case could only have the effect of denying appellees the equal protection of the laws in two principal ways:

1. As the court below held the "*effect of the statute is to discriminate geographically against all students, white and colored, in St. Helena or any other community where the schools are closed under its provisions*" (emphasis in original) (Appellants' Jurisdictional Statement, pp. 43-44). For as the opinion below states, "absent a reasonable basis for so classifying, a state cannot close the public schools in one area while, at the same time, it maintains schools elsewhere with public funds." (*Ibid.*) See *James* v. *Almond*, 170 F. Supp. 331 (E. D. Va. 1959), appeal dismissed 359 U. S. 1006; *Aaron* v. *McKinley*, 173 F. Supp. 944 (E. D. Ark. 1959), affirmed *sub nom.*, *Faubus* v. *Aaron*, 361 U. S. 197; *Bush* v. *Orleans Parish School*

Board, 187 F. Supp. 42 (E. D. La. 1960), affirmed 365 U. S. 569; id., 188 F. Supp. 916 (1960), affirmed 365 U. S. 569.

Education in Louisiana is a state as well as a local function. As the opinion below points out, "[t]he Louisiana public school system is administered on a statewide basis, financed out of funds collected on a statewide basis, under the control and supervision of public officials exercising statewide authority under the Louisiana Constitution and appropriate state legislation." See *Nelson* v. *Mayor, etc., of Town of Homer*, 48 La. Ann. 258, 19 So. 271; *Hill* v. *DeSoto Parish School Board*, 177 La. 329, 148 So. 248, 250; *State* v. *City of New Orleans*, 42 La. Ann. 92, 7 So. 674, 677; *State* v. *Barham*, 173 La. 488, 137 So. 862, 864; *Singelmann* v. *Davis*, 240 La. 929, 125 So. 2d 414, 417. And see Appendix A to opinion below in Appellants' Jurisdictional Statement, pp. 53-58.

The Louisiana Constitution at present provides for a single state system. Article 12, §1. Public education is within the control of the central state government, the state legislature, and the State Department of Education. See cases and statutes cited by the court below (Appellants' Jurisdictional Statement, p. 48).

The fact that the decision involved a prerequisite local referendum does not immunize it from the equal protection clause of the Fourteenth Amendment. See, *Board of Education* v. *Barnette*, 319 U. S. 624, 638; *Boson* v. *Rippy*, 285 F. 2d 43, 45 (5th Cir. 1960). Indeed the state acting through the electorate logically cannot be distinguished from the state as it acts through its legislature or executive agencies.

2. Fundamentally, the statute below and its application are integral parts of the Louisiana program of massive resistance against the requirements of the Equal Protec-

tion clause of the Fourteenth Amendment. Immediately following the decision of the Court of Appeals for the Fifth Circuit in *St. Helena Parish School Board* v. *Hall*, 287 F. 2d 376 (5th Cir. 1961), the Governor of the State called the Legislature into Extraordinary Session to legislate with respect to education and "the preservation and protection" of state sovereignty. Shortly thereafter he certified as Emergency Legislation Act No. 2, which is the subject of this case and related legislation designed to perpetuate racial segregation in education (see Opinion of the Court Below, Appellants' Jurisdictional Statement, p. 33). While the language of the statute is Aesopian, the circumstances of its legislative history and its obvious intent and effect expose it as merely another effort to perpetuate segregation. The opinion of the court below (Appellants' Jurisdictional Statement, pp. 36-38), sets forth the language of the President pro tem. of the Senate explaining the bill as follows:

> "As I see it, Louisiana is entering into a new phase in its battle to maintain its segregated school system. The keystone to this new phase is the local option plan we have under consideration." Times-Picayune, February 20, 1961. (Appellants' Jurisdictional Statement, p. 37.)

As the opinion of the court below sums it up:

> " . . . the legislative leaders announced without equivocation that the purpose of the packaged plan was to keep the state in the business of providing public education on a segregated basis." (Appellants' Jurisdictional Statement, p. 38.)

Pursuant to this scheme, following school closing, the board is authorized to dispose of school property to private

schools—in connection with which other legislation has authorized the establishment of cooperatives which may receive state grants-in-aid. See Act 257 Legislative Session of 1958, La. R.S. 17:2801; Act. No. 3, Second Extraordinary Session of 1960, La. R.S. 17:2901. The highly articulated plan of which Act No. 2 and these other acts are a part is described in greater length in the opinion of the court below. See Appellants' Jurisdictional Statement, pp. 38-42.

In proceeding with the implementation of Act No. 2, as part of this scheme to perpetuate segregation in the face of a federal court decree, the appellants merited the injunction entered against them before they had taken further steps to deny children of the parish their constitutional rights. For as this Court held in *Cooper* v. *Aaron*, 358 U. S. 1, 17:

> "The constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, not nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'"

And as the Court of Appeals for the Eighth Circuit held in the same case, *Aaron* v. *Cooper*, 261 F. 2d 97, 106, 107 (8th Cir. 1958):

> "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Fourteenth Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the Laws."

CONCLUSION

It is respectfully submitted that the appeal of the appellants St. Helena Parish School Board and its members and J. H. Meadows, Superintendent of Schools presents no substantial question for decision by this Court and that the order of the District Court should be affirmed. It is further submitted that the appeal of the appellants State of Louisiana, Attorney General of the State of Louisiana, Director of Public Safety of Louisiana, and the District Attorney and Sheriff of St. Helena Parish, Louisiana, is not within the jurisdiction of this Court and should be dismissed, or in the alternative, that the judgment should be affirmed as to these appellants.

Respectfully submitted,

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